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IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

No. 103

UNITED STATES OF AMERICA, *Appellant*

v.

ARMOUR & COMPANY and GENERAL HOST CORPORATION

On Appeal from the United States District Court for the Northern District of Illinois

MOTION TO AFFIRM

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MOTION TO AFFIRM

Pursuant to Rule 16, Paragraph 1(c), of the Revised Rules of this Court, appellee General Host Corporation moves that the judgment of the district court be affirmed on the ground that the questions on which decision of the cause depends are so unsubstantial as not to need further argument.

STATEMENT

This is a direct appeal from an order of the district court denying the Government's petition to add General Host Corporation ("General Host") as a party to the case of *United States* v. *Swift & Company*, Civil Action

No. 38 C 613 (N.D. Ill.), and further denying the Government's request to enjoin General Host from acquiring additional shares of stock in Armour & Company ("Armour") or from taking any action to control the affairs of Armour while General Host is engaged in certain businesses prohibited to Armour by the consent decree entered in the *Swift* case in 1920.

The district court's decision was based on its conclusions that no violation of the 1920 decree was threatened and that the petition for injunction failed to set forth any ground upon which relief could be granted against General Host should it be made a party to the case (C.L. 3, 5, 6; J.S. 7a-8a).[1] It is the position of appellee General Host that the district court's decision correctly interpreted the consent decree and the relevant legal principles, that no novel or significant question of law is presented, and that the judgment below should, therefore, be affirmed without further briefing or argument.

On January 21, 1969, the Government filed a petition seeking "to prevent and restrain violation" of the 1920 consent decree.[2] The petition alleged that the decree

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[1] "C.L." refers to the Conclusions of Law, and "F.F." to the Findings of Fact made by Judge Hoffman, dated January 30, 1969, which are printed as an Appendix to the Jurisdictional Statement filed by appellant ("J.S."). The record on appeal has not been consecutively paginated. Documents that are part of the record on appeal are cited by title and page within the document.

[2] The 1920 decree, sometimes referred to as the "Meat Packers Decree," was entered into in settlement of an antitrust case filed on February 27, 1920. The original bill in equity filed on that date charged violations of sections 1 and 2 of the Sherman Act (15 U.S.C. §§ 1 and 2), by Swift & Co., Armour & Co., Wilson & Co., the Cudahy Packing Co., Morris & Co., 80 subsidiary corporations, and 50 individual officers, directors, and stockholders of the

> perpetually enjoins and restrains Armour and Company . . . from manufacturing, jobbing, selling, transporting (except as common carriers), distributing or otherwise dealing in any of the products or commodities listed therein, including bread, flour, sugar, fresh milk and cream, and many other food products customarily found in food stores and restaurants,

and that "General Host, through its divisions and wholly-owned subsidiaries," including some that operate restaurants, is engaged in various activities prohibited to Armour by the decree (1969 Petition at 1, 2). The petition further alleged that General Host "has initiated and pursued a plan to acquire control of Armour," and that such control would "result in violation of the Decree entered in this cause on February 27, 1920, by causing Armour to be engaged in activities prohibited to it by the Decree" (1969 Petition at 3).

The petition asked that pursuant to section 5 of the Sherman Act, 15 U.S.C. § 5, a summons be issued "commanding General Host to appear and answer the allegations contained in this petition," that an injunction be issued restraining General Host from acquiring addi-

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corporate defendants. On the same day the case was filed, answers were filed denying the allegations of the bill, and a consent decree was entered granting the Government much, but not all of the relief sought. The allegations of the bill and the provisions of the 1920 consent decree are discussed in subsequent proceedings in which courts have considered applications to vacate or modify the decree. United States v. Swift & Co., 286 U.S. 106 (1932); United States v. California Cooperative Canneries, 279 U.S. 553 (1929); Swift & Co. v. United States, 276 U.S. 311 (1928); United States v. Swift & Co., 189 F. Supp. 885 (N.D. Ill. 1960), *aff'd*, 367 U.S. 909 (1961). The purpose and provisions of the 1920 decree, as applicable to the issues raised on this appeal, are discussed *infra* at pp. 9-12.

tional shares of Armour stock, and that General Host be permanently enjoined from "taking any action to exercise control over or to influence the business affairs of Armour, as long as General Host is engaged in businesses dealing in products listed in the Decree of February 27, 1920. . . ." (1969 Petition at 4).

The response filed by General Host admitted, *inter alia*, that it deals in bakery products, candies, crackers, dairy products, and cold beverages, that it operates restaurants and processes frozen convenience foods, and that it owned 16.5 per cent of the common stock of Armour and intended to acquire more. However, the response denied that control of Armour by General Host would violate the 1920 decree. (Response at 2, 3.)

The uncontradicted affidavit of Harris J. Ashton, President of General Host, submitted in opposition to the petition, asserted that General Host had at no time been a party to the *Swift* litigation, that it was not acting in concert with Armour management, that the two companies would "continue to be operated as separate companies," and that "General Host, once its representatives assume actual control of Armour, will be obliged to, and will see, that Armour does not engage in businesses forbidden to it by the Decree" (Ashton Affidavit at 2-4, 10).

Judge Julius Hoffman, who had presided over the 1958-60 proceedings relating to the consent decree, held a hearing on the Government's petition on January 21, 1969. The Government, electing not to offer any additional evidence, relied solely on its petition and the supporting affidavit. It contended in oral argument simply that

> if General Host acquires control of Armour and puts its own people on the board of Armour and

> Armour is engaged in the meat business that it is now in, [and] General Host is engaged in the bakery-restaurant-food store business that it is now in, then in the government's view that means that Armour through this board of directors who are General Host's men is indirectly dealing in the foodstuff products (Tr. 17-18).

At the conclusion of the hearing, Judge Hoffman delivered a lengthy oral opinion (Tr. 32-44), summarizing the relevant portions of the 1920 decree and the history of the proceedings (Tr. 32-33, 37-38, 40-41). He noted that General Host was not a party to the consent decree or to the earlier modification proceedings (Tr. 43-44), and ruled that the Government's petition was "grounded upon an interpretation of the 1920 decree which not only goes beyond the terms of that decree but also was not . . . intended by any of the parties to it as a logical extension of that decree" (Tr. 37). The court pointed out that

> the decree was drafted with great care and after lengthy consideration of each of its several provisions. . . . The decree very clearly enjoined the defendants who were parties to it from, for example, holding a controlling interest in any concern, handling or dealing in the food commodities listed therein, but the converse is not proscribed - - that is, the decree does not forbid any other company engaged in handling or dealing in food commodities from securing a controlling interest in one of the defendants. (Tr. 37-38.)

Accordingly, the court found, the Government's petition did not seek enforcement of the decree but rather was an attempt to expand the decree, based on "the so-called 'intention of the decree' " (Tr. 38). Judge

Hoffman pointed out that the purpose of the decree was to prevent the large meat packers from "extending [their] monopolistic grasp toward the rest of the food industry" (Tr. 40-41), and that the decree would not be violated if a company such as General Host acquired control of Armour (Tr. 42-43).

Concluding, the court suggested that if the Government feared that the proposed acquisition "[posed] a genuine threat to free competition in the food industry, both meat and non-meat, then it may be appropriate to bring a separate antitrust action against General Host under the appropriate statute . . . ," but that

> it is not at the same time warranted in filing a petition in aid of a decree binding Armour when the villain of the piece, if there be a villain, is a corporation not a party to that decree, never envisioned by its draftsmen as properly within the scope of such decree, and even now only speculatively related to one of the defendants bound by that decree (Tr. 43-44).

Consequently, the court declined to apply 15 U.S.C. § 5 to add General Host as a party to the action (Tr. 44).

Findings of fact and conclusions of law consistent with the earlier oral opinion were entered on January 30, 1969 (J.S. 1a-9a). No stay pending appeal was sought by the Government, and, accordingly, the exchange offer was made and accepted by holders of sufficient Armour stock to give General Host a majority of that stock.

ARGUMENT

Attempting to show that its appeal presents issues of sweeping importance to antitrust enforcement, the Government contends that the district court erroneously held that courts of equity are "powerless" to prevent a third party from causing a violation of an antitrust decree by means of an involuntary takeover of a company subject to such a decree (J.S. 8). This holding, the Government claims, "invites general frustration of structural prohibitions in antitrust decrees through involuntary takeovers, an increasingly common business phenomenon" (J.S. 7).

The "issue" raised by the Government presupposes that General Host's acquistion of Armour creates a relationship inconsistent with the 1920 consent decree. If, however, the acquisition is *consistent* with the decree, then, clearly, the district court had no occasion to consider whether it had the power, by means of a supplemental order at the foot of the decree, to grant the requested injunctive relief against General Host. In fact, that question was not reached below and is not presented on this appeal since the district court concluded that the "1920 decree does not prohibit control of Armour & Co. by General Host" and, therefore, that "[n]o violation of the 1920 decree is threatened or imminent" (C.L. 4, 5; J.S. 7a).

Thus, the essential question presented on this appeal is whether the district court correctly interpreted the 1920 decree in holding that it does not prohibit the control of Armour by General Host. This is a straightforward question of interpretation that can be disposed of without full briefing and argument.

I.

GENERAL HOST'S CONTROL OF ARMOUR DOES NOT CREATE A RELATIONSHIP IN VIOLATION OF THE 1920 CONSENT DECREE

The Government's approach to the decree is a simplistic one. It contends that since Armour itself is prohibited from engaging in certain grocery and food product lines of commerce, it follows that Armour may not be owned or controlled by a company engaged in those lines. Under the decree, as the Government conceives it, "the acquisition of a controlling interest in Armour by General Host is as inconsistent with the decree as would be the acquisition of General Host by Armour" (J.S. 9) and "the mere creation of a direct or indirect relationship was barred by the decree" (J.S. 9, n. 6).

The Government's error is basic and transparent. It assumes that the decree established a total and permanent separation of the meat packer defendants *and the interests that control them* from the general grocery business and other specified product lines. The plain language of the decree refutes this assumption, and the decree has long been interpreted by the Government to permit those in control of Armour (and other corporation defendants) to engage in activities prohibited to Armour itself.

A. The District Court's Interpretation Comports with the Plain Language of the 1920 Decree.

Judge Hoffman is unusually knowledgeable about the intent and purpose of the 1920 decree, since he presided over extensive hearings on petitions filed in 1956 in which certain of the defendants sought modification of the decree's prohibitions against their engag-

ing in the substitute food business.[3] Having examined the Government's petition in this case in the light of his knowledge of the decree, he concluded that "the interpretation of the decree for which the Government contends goes beyond the plain language of the decree. It cannot be considered a logical extension of the decree." (F.F. 21; J.S. 6a.) This conclusion is plainly correct.

The thrust of the bill filed in the *Swift* case in 1920 was that the meat packers defendants, through their officers, directors, employees, and other defendants conspiring with them, had used their joint control of stockyards, terminal railroads, market journals, and other appurtenances of the packing business to monopolize interstate commerce in livestock, meat products, and substitute foods (1920 Petition, *passim*). The Government sought to enjoin the defendants from continuing any monopolization or restraint of trade in the purchase, sale, or distribution of livestock and other commodities then being handled by them, to require divestiture of stockyards, terminal railroads, public cold storage warehouses, and other facilities, to enjoin the corporate defendants from permitting their distributive facilities to be used for substitute foods, and to require divestiture by all defendants of any interest in companies dealing in the substitute foods (1920 Petition at 28-30).

The case was settled by a consent decree which, as Judge Hoffman found, "was obviously the product, in principal part, of extensive negotiation between the defendants and the Government and is a detailed and

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[3] United States v. Swift & Co., 189 F. Supp. 885 (N.D. Ill. 1960), *aff'd*, 367 U.S. 909 (1961).

carefully worded decree" (F.F. 23; J.S. 6a). As would be expected in a consent settlement,[4] not all the relief sought by the Government was granted.[5] Certainly, as the language of the decree makes plain, it did not effect the rigid and permanent separation of meat packing and other food interests which the Government now claims that it did.

Paragraph Fourth of the decree (J.S. 13a-17a), on which the Government principally relies, was intended, as Judge Hoffman noted, "to restrict the corporate defendants in the use of the vast power they had acquired to extend their power into other markets" (F.F. 24; J.S. 6a; *see* Tr. 40-41). Consistent with this purpose, Paragraph Fourth provides

> That *the corporation defendants and each of them be,* and they are hereby, perpetually enjoined and restrained from . . . either directly or indirectly, by themselves or through their officers, directors, agents, or servants, engaging in or carrying on, either by concert of action or otherwise, . . . the manufacturing, jobbing, selling, transporting (except as common carriers), distributing, or otherwise dealing in . . .

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[4] This Court has pointed out that "the circumstances surrounding such negotiated agreements are so different from [litigated judgments] that they cannot be persuasively cited in a litigation context." United States v. E. I. duPont de Nemours & Co., 366 U.S. 316, 330 & n.12 (1961).

[5] For example, although the petition asked that the corporate defendants be forbidden to deal in poultry, butter, eggs, and cheese (1920 Petition at 22-23, 29-30), the decree does not contain such an injunction. Similarly, the petition asked that *all* defendants be enjoined from engaging in the non-meat, so-called substitute food business (1920 Petition at 29-30), yet the decree permits the individual defendants to retain or acquire stock in such corporations (Paragraph Fifth, J.S. 18a). *See generally* United States v. Swift & Co., *supra*, 189 F. Supp. at 906.

a number of non-meat foods and miscellaneous products (J.S. 13a-14a) (emphasis added). It further enjoins the corporation defendants from owning stock or any interest in any corporation engaged in the prohibited businesses (J.S. 17a). This paragraph does not apply at all to the stockholders of the corporation defendants, or to the successors and assigns of either the corporations or their stockholders.

Certain individuals who were "large stockholders of parent companies and subsidiaries who [were] otherwise affiliated in commercial operations with the active heads of the parent companies" were joined as defendants in the 1920 petition because of their personal activities in furtherance of the alleged restraints of trade and monopolies (1920 Petition at 26-27). Paragraph Fifth of the decree (J.S. 18a-20a) responds to the allegations of the petition directed at the individual defendants. Contrary to the Government's claim that the decree effected a complete structural separation of meat packing and other food product interests, Paragraph Fifth does not entirely preclude the individual defendants from engaging in those food product businesses forbidden to the corporate defendants. Rather, it merely enjoins the individuals from owning 50 per cent or more of the effective voting stock in corporations engaged in many (but not all) of the activities forbidden to the corporate defendants by Paragraph Fourth (J.A. 18a-20a).

The prohibition against owning 50 per cent of the voting stock is supplemented by an injunction at the conclusion of Paragraph Fifth against "adopting any device or arrangement which by reason of the relation of said individual defendants . . . to [any of] the corporation defendants" would give a competitive ad-

vantage to any food product business in which the individuals had an interest (J.S. 20a). Under Paragraph Fifth, therefore, an individual defendant, who might be a controlling stockholder in one of the meat packing defendants, could own a controlling interest (up to 50 per cent of the voting stock) in a company dealing in substitute food products, as long as he did not use his meat packer connections to give his non-meat packing business an advantage over its competitors. Thus, it is clear that the decree did not impose the complete separation of meat packing and other food product interests which the Government now assumes it did (see J.S. 8).

Finally, Paragraph Fifth, like Paragraph Fourth, does not run against successors and assigns of the named defendants. Paragraph Third, on the other hand, which restricts the use that may be made of the corporation defendants' distributive facilities, specifically applies to "successors and assigns" (J.S. 12a). In view of the presence of a "successors and assigns" clause in Paragraph Third, the absence of a similar provision in Paragraphs Fourth and Fifth must be assumed to have been deliberate, and Judge Hoffman so found (F.F. 27; J.S. 7a). Clearly, the prohibitions of Paragraph Fifth were included to insure that the individual defendants, who were charged with conspiring with the corporations, could not continue their improper activities, rather than from a concern that *all* packer stockholders, present or future, might so misuse their holdings.[6] In any event, it is plain that Paragraph Fifth does not apply to those who have succeeded to the interests of individual stockholder defendants.

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[6] *Cf. Hartford-Empire Co.* v. *United States*, 323 U.S. 386, 402-04 (1945).

To sum up, Armour itself was, and still is, prohibited from engaging in the activities enumerated in Paragraph Fourth; individual stockholders of Armour who were defendants in the 1920 case were and are subject to the prohibitions of Paragraph Fifth; but there is absolutely no provision in the decree that extends those prohibitions to companies or individuals which subsequently have acquired the stock of the corporation defendants. As we next show, the Government itself has long adhered to a construction of the decree that permits those in control of a corporation defendant to engage in activities forbidden to such defendant.

B. The District Court's Interpretation of the 1920 Decree Is in Harmony with Long-Standing Prior Interpretation.

In urging that the 1920 decree prohibits a company such as General Host from controlling Armour, the Government fails to recognize that in the past it has interpreted the decree to permit analogous control. Its present argument is an impermissible attempt to depart from a long-standing, logically indistinguishable interpretation of the decree. In *United States* v. *Atlantic Refining Co.*, 360 U.S. 19 (1959), this Court rejected a similar attempt by the Government to revoke an interpretation of a consent decree, holding

> that where the language of a consent decree in its normal meaning supports an interpretation; where that interpretation has been adhered to over many years by all the parties, including those government officials who drew up and administered the decree from the start; and where the trial court concludes that this interpretation is in fact the one the parties intended, we will not reject it simply because another reading might seem more consistent with the Government's reasons for entering into the agreement in the first place. 360 U.S. at 23-24 (footnotes omitted).

Judge Hoffman found that the 1920 decree "has not been construed to limit the business activities of non-defendant Armour stockholders nor to charge Armour with engaging in the businesses in which its controlling stockholders are engaged" (F.F. 20; J.S. 5a). This finding, which the Government does not dispute—and indeed does not even mention—is based on uncontroverted evidence that the same interests that have controlled Armour also control a Chicago public stockyard company although Armour, itself, had been required to divest all of its interest in that company. The essential facts regarding these relationships, as spelled out in the affidavit of James H. Kelley, are that since at least 1957, the Prince family interests have controlled both Armour and the above stockyard company; that there is reason to believe that the Government has been aware of this joint control since at least 1958; that no proceeding has been instituted by the Government on the theory that the 1920 decree prohibits those in control of Armour, as distinguished from Armour itself, from owning a stockyards business; that rather "the parties appear consistently to have construed the paragraphs of the Decree here relevant as applicable only to the interests and operations of the defendants themselves, not to the interests and operations of those stockholders of Armour who are in actual control of that company" (Kelley Affidavit at 7-8). The Government did not, and does not, question the truth of the Kelley affidavit.

The decisive significance of the above facts to the issue of interpretation raised by this case is obvious. Paragraph Second of the 1920 decree prohibits Armour and other corporation defendants

> from owning, either directly or indirectly, individually or by themselves, or through their officers,

> directors, agents or servants, any capital stock or other interest whatsoever in any public stockyard market company in the United States . . . (U.S. 12a).

If, as the Government now contends, the decree was intended to forbid any and all relationships between the defendants *and those who control them* and the activities specified in the decree, then it would follow that those who control Armour, in addition to Armour itself, would be prohibited from having any interest in a public stockyard market company in the United States. The decree, however, has not been so interpreted by the Government, which, with knowledge of the relationship, has permitted those in control of Armour also to control public stockyard companies.

There is, we submit, no difference in principle between the Prince interests' control of the stockyards (explicitly forbidden to Armour by Paragraph Second of the decree) and General Host's interests in various food product lines of commerce (similarly forbidden to Armour itself by Paragraph Fourth of the decree). The district court was plainly correct, therefore, in refusing to depart from the interpretation, long adhered to by the parties, under which those in control of Armour have been permitted to engage in activities prohibited to Armour itself. *United States v. Atlantic Refining Co.*, *supra*. This is particularly true where, as here, that interpretation is not only consistent with, but compelled by, the plain language of the decree.

It is possible that if the Government were negotiating the Meat Packers Decree today, it might insist upon broader structural relief than was obtained. It is possible also that had the Government prevailed after a

trial on the merits, it would have sought and obtained more extensive relief. However, having agreed to less than all the relief to which it might have been entitled after trial, the Government cannot now obtain expansion of the decree beyond its terms.[9]

The Government's present attempt to expand the 1920 decree is similar to that rejected by this Court in *Hughes* v. *United States*, 342 U.S. 353 (1952). There, too, the Government asked the Court to construe a consent decree "so as to achieve the purposes of the entire decree" (342 U.S. at 357), the thrust of which, it claimed, was to separate production-distribution companies from theater exhibition companies. The construction sought by the Government would have required Hughes, who owned stock in both types of company, to sell one type of stock. Although recognizing that this single ownership might well impede competition, the Court declined to adopt the Government's interpretation of the decree, for it found "no fair support for reading that requirement into the language of [the decree]" (342 U.S. at 357).

We submit that in this case, also, there is "no fair support" in the decree for the Government's strained interpretation, and that the district court was plainly correct in holding that the "1920 decree does not prohibit control of Armour & Co. by General Host" (C.A. 4; J.S. 7a).

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[9] Ford Motor Co. v. United States, 335 U.S. 303, 320, 322 (1948); United States v. International Harvester Co., 274 U.S. 693, 707-08 (1927); United States v. Radio Corp. of America, 46 F. Supp. 854 (D. Del. 1942), *appeal dismissed*, 318 U.S. 796 (1943); see Swift & Co. v. United States, 276 U.S. 311 (1928); United States v. American Soc'y of Composers, Authors & Publishers, 331 F. 2d. 117, 123-24 (2d Cir.), *cert. denied*, 377 U.S. 997 (1964).

II.

THE DECISION BELOW POSES NO THREAT WHATEVER TO ANTITRUST ENFORCEMENT

The Government expresses concern that unfriendly corporate takeovers may lead to frustration of certain kinds of antitrust judgments because the acquiring company is neither a party nor, since the takeover is unfriendly, in privity with a party to the judgments. In such circumstances, under traditional concepts which limit the effect of *in personam* judgments, the acquiring company would not be bound by the decree.*

Conceding that the decree "as heretofore framed—does not bind General Host *in personam*," the Government argues that the district court should have exercised the "inherent power" of a court of equity to protect its decrees against interference by the actions of a third party (J.S. 11-12), and that its failure to do so opens the gates to widespread evasion of structural antitrust decrees through unfriendly acquisitions (J.S. 14-15).

There are several infirmities in this *in terrorem* argument, the first being that, as shown in Part I, *supra*, no frustration of the 1920 Meat Packers Decree was threatened by General Host's acquisition of Armour. Thus, the court had no occasion to rule on the hypothetical situation posed by the Government, and the decision below is no authority one way or the other on the question of an equity court's power to

* See, e.g., Zenith Radio Corp. v. Hazeltine Research, Inc., 37 U.S.L.W. 4424 (U.S. May 19, 1969) (No. 9); Lawlor v. National Screen Service Corp., 349 U.S. 322 (1955); Hansberry v. Lee, 311 U.S. 32, 40-41 (1940); Knoeland v. Lane, 141 U.S. 547 (1891); see Pennoyer v. Neff, 95 U.S. 714 (1878).

prevent interference with its decrees through unfriendly takeovers.

There can be no doubt that if General Host, after obtaining control of Armour, were to exercise such control to further General Host's interests in the lines of business prohibited to Armour, the court could enter appropriate injunctive relief since General Host, by acting in concert with Armour, would subject itself to the decree under well recognized principles.* This was clearly recognized by the district court when it stated that "if it does come to pass that men do come on to the board of Armour and Company and through this . . . subsidiary or associated company proceed to violate the provisions of the decree, I would restrain them on that showing" (Tr. 17). However, because the court concluded that no such violation of the decree was threatened or imminent (C.L. 5; J.S. 7a), it refused to enter the injunction sought by the Government.

With respect to antitrust decrees to be entered in the future, it lies fully within the Government's power to

* *See, e.g.*, Mississippi Valley Barge Line Co. v. United States, 273 F. Supp. 1 (E.D. Mo. 1967), *aff'd sub nom.* Osbourne v. Mississippi Valley Barge Line Co., 389 U.S. 579 (1968); Bullock v. United States, 265 F. 2d 683, 693 (6th Cir.), *cert. denied*, 360 U.S. 909 (1959). To the extent that the Government relies on these and other cases as authority for the proposition that courts of equity can enjoin third persons *not* acting in concert with a party, it is in error. Each of the cases cited at J.S. 12-13 involved persons acting in concert with parties to the original decrees. Especially inaccurate is the citation of the *Mississippi Valley Barge Line Co.* case, for in that case, after restating the general principles quoted by the Government, the court specifically found that the new parties

> [had] been and [were] acting in concert with [the original party to the action]. *This being the situation*, our decree is binding upon them and the motion to enforce the judgment shall extend to them as well as to [the original party]. 273 F. Supp. at 6 (emphasis added).

prevent the establishment of undesired structural relationships through involuntary acquisitions. The Government cannot be compelled to enter into a consent judgment, *United States* v. *Ward Baking Co.*, 376 U.S. 327 (1964), and if it litigates to a successful conclusion, there can be no doubt that it is entitled to relief that will prove durable and effective. "For it is well settled that once the Government has successfully borne the considerable burden of establishing a violation of law, all doubts as to the remedy are to be resolved in its favor." *United States* v. *E. I. duPont de Nemours & Co., supra*, 366 U.S. at 334 (footnote omitted). Thus, if the Government desires that companies engaged in one business not be affiliated with companies engaged in other businesses, it may, as it has in the past, insist on a decree that affords such relief.[19]

Furthermore, there are several well accepted procedures for insuring that existing antitrust decrees are not thwarted by third party conduct. One procedure is to add the third party to the original complaint, pursuant to section 5 of the Sherman Act, and establish that it was guilty of the unlawful activity originally charged. Indeed, it has been held that this *must* be done before a court can enjoin a third person, not act-

[19] For example, effective separation of the production and exhibition functions of the motion picture business was achieved by the "movie" decrees. To insure that such separation would be effective and enduring, these decrees, among other things, required the defendants to adopt bylaws for the new companies which provide that no person affiliated with a competitor (even as "substantial stockholders") can be an officer or director unless he is first approved by the Government and the Court. United States v. Loew's, Inc., 1952-53 Trade Cas. ¶ 67,228 (S.D.N.Y. 1952); 1950-51 Trade Cas. ¶ 62,861 (S.D.N.Y. 1951); 1950-51 Trade Cas. ¶ 62,765 (S.D.N.Y. 1951).

ing in concert with a party to a judgment.[11] Alternatively, the Government can move to modify the provisions of the decree on the ground that, as framed, it does not insure the intended remedial relief. This course of action was open to the Government in this case. No doubt it was not pursued because the Government felt it could not make the "clear showing of grievous wrong evoked by new and unforeseen conditions," which this Court has held is necessary before it will "change what was decreed after years of litigation with the consent of all concerned." *United States* v. *Swift & Co.*, 286 U.S. 106, 119 (1932). And, of course, the Government can file a new and distinct complaint charging that the acquisition violates section 7 of the Clayton Act (15 U.S.C. § 18) and seeking appropriate injunctive relief.

There is, however, little point in abstract discussion of the remedies available to prevent acquistions that

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[11] *United States* v. *Bayer Co.*, 105 F. Supp. 955 (S.D.N.Y. 1952). In *Bayer*, the Government sought to make General Aniline & Film Corporation (General Aniline) subject to a consent decree entered in an antitrust case to which General Aniline had not been a party, on the ground that a state court proceeding being brought by General Aniline threatened to "obstruct and thwart the effectuation of the" consent decree. The federal court held that since General Aniline had not been privy to the consent decree, it could not be bound by its provisions. Thus, although the court agreed that General Aniline could be added as a party to the original petition attacking a contract of which it was assignee, it held that General Aniline could insist that the Government prove that the underlying contract was indeed violative of the antitrust laws. *Accord, e.g.*, Raylite Elec. Corp. v. Noma Elec. Corp., 170 F. 2d 914 (2d Cir. 1948); United States v. Carter Prods., Inc., 211 F. Supp. 144 (S.D.N.Y. 1962); *see* National Licorice Co. v. NLRB, 309 U.S. 350, 363-66 (1940); United Pharmacal Corp. v. United States, 306 F. 2d 515 (1st Cir. 1962); Kean v. Hurley, 179 F. 2d 888 (8th Cir. 1950); Alemite Mfg. Corp. v. Staff, 42 F. 2d 832 (2d Cir. 1930); United States v. Dean Rubber Mfg. Co., 71 F. Supp. 98 (W.D. Mo. 1946).

threaten to create a violation of antitrust decrees to which the acquiring company is not a party. The adequacy of existing remedies to deal with that situation, and the need, if any, to depart from long-established rules regarding the effect of *in personam* judgments on non-parties, can more profitably be considered in the context of a case involving the threatened violation of a decree. This, as we have shown, is not such a case since General Host's acquisition of Armour without more does not violate the decree.

CONCLUSION

The district court correctly interpreted the 1920 consent decree as not prohibiting control of Armour by General Host, and this appeal presents no questions warranting further briefs and oral argument. The judgment of the district court should be affirmed.

Respectfully submitted,

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